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October 24, 2000

BY FACSIMILE AND FIRST CLASS MAIL

Hon. Nicholas G. Garaufis
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Department of Amazonas, et al. v. Philip Morris Companies,Inc., et al.*, 00 CV 2881 (NGG) (Consolidated)

Dear Judge Garaufis:

By his conspicuous silence, plaintiffs' counsel in his letter to the Court, dated October 20, 2000, essentially concedes that (1) the retainer agreements between various Departments of Colombia and their counsel provide that the Departments will have no financial risk in this litigation; that their attorneys will indemnify them for any judgment or order of this Court; and that the Departments will have no obligation to repay any costs advanced on their behalf in the event that there is no recovery in the suits; and (2) such provisions violate the ethical standards in the New York State Lawyer's Code of Professional Responsibility and the applicable statute in New York, Judiciary Law § 488(2).

Accordingly, on behalf of the defendants, we request that the Court establish an expedited briefing schedule to address the legal questions of whether the New York ethics standards and statutes govern the conduct of counsel in lawsuits brought in this federal district court and, if so, whether the appropriate remedies are dismissal of the action and/or disqualification of counsel. We are prepared to file our opening brief by November 8 with the hope of a hearing before the Court by the last week in November, prior to the December 1 date by which defendants must file their motions to dismiss on jurisdictional and other substantive grounds.

When stripped of its vitriol and self-serving rhetoric, the only justification for the champertous provisions offered in the five-page letter of plaintiffs' counsel is that Louisiana law governs this matter, that an unnamed Louisiana "ethics expert" has given them an opinion that our objections have "no substance" and that another unnamed but "highly regarded New York law professor" has opined that New York courts will honor contractual choice of law provisions.

Not only does the letter fail to submit to the Court or to opposing counsel either alleged expert opinion, but the letter also fails to cite a single Louisiana statute, ethics provision or case that would uphold these champertous retainer provisions. In fact, our limited research reveals that Louisiana's statutes and ethical provisions, as interpreted by its courts, would prohibit these contractual arrangements. *See, e.g.*, La. Civ. Code Ann. art. 2447 (prohibiting attorneys from acquiring an interest in litigation); Louisiana State Bar Article 16 Rules of Professional Conduct § 1.8(j); *Louisiana State Bar Ass'n v. Sanders*, 568 So. 2d 1025 (La. 1990) (disciplining attorneys who "inadvertently" entered into similar arrangements). *See also Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437, 446 (La. 1976) (prohibiting a promise to be responsible for costs as an inducement to obtain a retention).

However, Louisiana law has nothing to do with the ethical requirements of attorneys who have initiated and are pursuing claims in this Court. As former Chief Judge Sifton explained in denying class certification to attorneys from out of state with similar prohibited arrangements with their clients, this Court "applies the New York Code of Professional Responsibility" to attorneys who appear before this Court. *Berrios v. Sprint Corp.*, 1998 Westlaw 199842 at * 16 (E.D.N.Y. March 16, 1998). *See also* S.D.N.Y. and E.D.N.Y. Local Civil Rule 1.3(a)(7) (admission requires verification of adherence to the New York Code of Professional Responsibility); Local Civil Rule 1.5(b)(5) (violation of the New York Code of Professional Responsibility is grounds for discipline).

As we are sure is apparent to the Court, this dispute is not about an effort to enforce a contractual choice of law provision between two parties to a contract. This dispute is about the ethical rules and judicial directives applicable to attorney conduct in litigation invoking the Court's processes against third parties. The lawyers and their clients cannot select those rules and directives; once they have invoked this Court's processes, they are bound by the regulations and obligations imposed by this Court and by the laws and regulations imposed by the state in which it sits. As one commentator has explained:

> "Ethics rules are fundamentally different from contract law – the former is regulatory, while the latter facilitates transactions. Thus, while it is acceptable for parties to choose the law to govern their contracts by agreement, it is not acceptable for ethics rules to be chosen in this manner.... The client's [and the lawyers'] self-interest may be at odds with the interests of important beneficiaries of the rules. Third parties are protected by many of the ethics rules, and the broader interests of the integrity of a state's legal

> profession and system of justice are implicated by virtually all of the rules."

Roach, *The Virtues of Clarity: The ABA's New Choice of Law Rule for Legal Ethics*, 36 S. Tex. L. Rev. 907 428-9 (1995).

For this reason, none of the cases cited in plaintiffs' counsel's letter dealing with choice of law provisions is remotely relevant. All of those cases are breach of contract cases in which a party who had agreed to a choice of law provision brought suit to enforce that contract.

Nor is the remedy as simple as Mr. Halloran's letter suggests. The circumstances of the Departments' entering into the retainer letters, which will be spelled out in more detail in our brief, suggest that plaintiffs, or at least a substantial number of them, would not have authorized the filing of the suits if they had believed that they were at any financial risk in joining in the scurrilous allegations underlying this questionable lawsuit. As we shall demonstrate in our briefs, Colombia, like Great Britain, generally operates in commercial litigation on the principle that a losing plaintiff must pay the attorneys' fees and costs of victorious defendants. Undoubtedly recognizing that this unprecedented lawsuit, if allowed to go forward, could result in substantial attorneys' fees and costs to the defendants, the plaintiff Departments, which in opposing the motion for stay claimed to be in dire financial condition, clearly did not want to be on the line for defendants' anticipated substantial fees and expenses. Thus, they undoubtedly were comforted by the indemnification provisions provided by plaintiffs' counsel and the assurances of counsel that the plaintiffs would never be responsible for any costs or any judgments or judicial awards made to defendants.

Moreover, the remedy for being caught in wrongful conduct is not simply a promise to forego the rewards and reform the conduct in the future. As the Second Circuit has recognized: "[a] trial judge is required to take measures against unethical conduct occurring in connection with any proceeding before him. It is his duty and responsibility to disqualify counsel for unethical conduct prejudicial to counsel's adversary." *Gentner v. Shulman*, 55 F.3d 87, 89 (2d Cir. 1995). The appropriate relief here is among the issues to be addressed in briefs.

In our proposed brief, we will demonstrate that the New York Code of Professional Responsibility governs the propriety of plaintiffs' counsel's undertakings, that the New York Code and a state statute prohibit the arrangements that plaintiffs' counsel have entered into and that the appropriate relief includes dismissal of these cases, perhaps without prejudice, and/or disqualification of counsel. *See Sprung v. Jaffe*, 3 N.Y. 2d 539, 544, 169 N.Y. S. 2d 456 (N.Y. 1957). We believe that the appropriate remedy should be dismissal of the actions without prejudice and disqualification of counsel so

that the Departments may consider with untainted counsel whether they wish to pursue these actions with the knowledge that they may be at financial risk for costs and any judicial awards that may be made.

In anticipation of filing such a brief, we request the Court to order plaintiffs' counsel to file with the Court and to serve upon defendants' counsel the alleged expert opinions of the unidentified Louisiana "ethics expert" and "New York law professor" so that we may respond to their contents. We also request that the Court order the filing and service of the alleged affidavit by "a representative" of the clients regarding the background to these provisions and the proposed cure. Notwithstanding counsel's free-wheeling assertion of attorney-client privilege, no factual basis has been presented to justify submission of these items to the Court on an *ex parte* basis, as plaintiffs' counsel apparently proposes. In fact, counsel's description of the affidavit raises more questions than it answers. Although plaintiffs purport to be 25 separate entities, the letter refers to a single representative who is apparently empowered to speak on behalf of all of them. Moreover, in one sentence the letter states that this representative can aver that the provisions could be deleted from the various retainer letters while in the next sentence counsel asserts that there are "numerous plaintiffs ... that would need to review this matter and consult with their respective legal services."

We note that even while arguing that the provisions of the retainer agreement are proper under Louisiana law, Mr. Halloran's letter takes pains to distance his firm, Speiser, Krause, Nolan & Granito, from the agreement by stressing that Speiser Krause is not a signatory to the agreement. However, as the terms of the agreement suggest, Speiser Krause has joined the plaintiffs' team subject to all of the terms and conditions of the retainer arrangements. Under the terms of the retainer agreements, the signatory firms, Krupnick Campbell and Sacks & Smith, were permitted to retain additional counsel as they saw fit without increasing either the fees or costs to the Departments. (*See* Boyaca Agreement ¶3.) The agreement provides that the signatory firms are to pay for such additional attorneys out of their fees and that no costs incurred by the additional attorneys will be the responsibility of the Departments in the event of no recovery. *Id.* Therefore, as a subcontractor to the signatory firms, the Speiser Krause firm is inextricably bound up with the arrangement and, of course, bears an equal responsibility for compliance with the ethical rules of this Court.

We also note that from the outset the plaintiff Departments apparently intended that these lawsuits be brought in New York. In the announcement by the plaintiff Departments of their intention to file suit in May 1999, before the retainer letters that are publicly available in Colombia were signed, the plaintiffs' representatives announced that this litigation would be pursued in New York. Under these circumstances, it is certainly

appropriate that all of plaintiffs' counsel be required to comply with the ethical rules that obtain in this Court.

A fair bit of Mr. Halloran's letter is taken up with attacking defendants' counsel for raising this issue. As I indicated when I appeared before the Court on October 13, we regret having to raise the issue but believe we are obligated under the rules to do so[1] and believe that our clients have standing to pursue the matter because they are the victims of what we believe are unethical arrangements. While the retainer agreements with governmental entities and the ethical proscriptions are matters of public record, we are quite willing, if the Court desires, to brief and argue this matter *in camera* and to agree to the sealing of any documents dealing with this matter, including our prior correspondence, Mr. Halloran's letter and the pertinent portion of the transcript of the October 13 conference.

In short, we ask the Court, under such terms and conditions as the Court may deem appropriate, to (1) require plaintiffs' counsel to file and serve the two opinions of experts and the affidavit of the client representative which are referred to in the October 20 letter; and (2) establish a briefing schedule that will allow the parties to address the ethical questions and the appropriate remedies so as to permit the Court to resolve this matter in an expeditious manner.

Respectfully submitted,

Irvin B. Nathan
Counsel for Philip Morris Defendants

cc: John J. Halloran, Jr., Esq.
Kevin A. Malone, Esq.
Andrew Sacks, Esq.
Ronald S. Rolfe, Esq.
David Bernick, Esq.
(By Facsimile and Regular Mail)

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[1] *See* N.Y. Code of Professional Responsibility EC 1-4 (integrity of the profession maintained only if conduct in violation of Disciplinary Rules is brought to the attention of the proper officials).